

Garcia v Winthrop Univ. Hosp.

2008 NY Slip Op 30580(U)

February 8, 2008

Supreme Court, Nassau County

Docket Number: 6744-05/

Judge: F. Dana Winslow

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SCAN

**SHORT FORM ORDER
SUPREME COURT - STATE OF NEW YORK**

Present:
HON. F. DANA WINSLOW,

**Justice
TRIAL/IAS, PART 7
NASSAU COUNTY**

RUBEN GARCIA,
Plaintiff,

**MOTION DATE: 11/13/07
MOTION SEQ.: 004, 005, 006**

- against -

INDEX NO.: 016744/05

**WINTHROP UNIVERSITY HOSPITAL,
GERALD BRODY, M.D., LOUIS H. RIINA, M.D.,
NASSAU HEALTH CARE CORPORATION and
NASSAU UNIVERSITY MEDICAL CENTER,**

Defendants.

The following papers have been read on this motion (numbered 1-9):

[004]
Notice of Motion (Winthrop).....1
Affirmation in Opposition.....2
Reply Affirmation.....3
[005]
Notice of Motion (Riina).....4
Affirmation in Opposition.....5
Reply Affirmation.....6
[006]
Notice of Motion (NUMC).....7
Affirmation in Opposition.....8
Reply Affirmation.....9

In this medical malpractice action, defendants WINTHROP UNIVERSITY HOSPITAL's ("Winthrop") and LOUIS H. RIINA, M.D.'s ("Riina") motions for summary judgment pursuant to CPLR §3212 dismissing the complaint as to them and defendants NASSAU HEALTH CARE CORPORATION's and NASSAU UNIVERSITY MEDICAL CENTER's (collectively, "NUMC") motion seeking leave to serve a supplemental bill of particulars, are determined as follows.

By Order, dated September 1, 2006 the Court denied a motion by Riina and defendant Gerald Brody, M.D. ("Brody") to amend their answer to assert culpable conduct on the part of plaintiff on the basis that the defendants failed to allege a causal relationship between the purported culpable conduct and plaintiff's injuries. By Order, dated October 20, 2006, the Court granted Brody's motion to dismiss unless plaintiff submitted a sur reply within 10 days of the date of the Order, which plaintiff failed to do, demonstrating that there was an indicia of responsibility sufficient to maintain a claim against Brody. By Order, dated February 28, 2007, the Court granted defendant Riina's motion to reargue the Court's Order of September 1, 2006, and, upon reargument, granted Riina's motion to amend his answer pursuant to CPLR §3025 to assert the affirmative defense of plaintiff's culpable conduct.

On July 3, 2004, plaintiff was treated at Winthrop for injuries to his left hand sustained in connection with a landscaping accident. Plaintiff initially presented at Brunswick Hospital and was transferred to Winthrop by ambulance. Plaintiff was purportedly transferred to Winthrop to enable him to be seen by a hand surgeon. After being evaluated by a triage nurse and a physician's assistant, plaintiff was examined by Riina, a plastic surgeon trained in hand surgery. Riina cleaned the injury, prescribed antibiotics and closed the wound. Riina testified that plaintiff's condition was not emergent and that he followed this procedure to allow the "tissues to get back to a more normal condition." Plaintiff was referred for a follow-up appointment at the Hand Clinic at defendant Nassau University Medical Center (the "Hand Clinic") allegedly scheduled for "Tuesday". Riina testified, through an interpreter, that he informed plaintiff that it was very important to follow up at the Hand Clinic. Riina also testified that he was "reasonably sure" that plaintiff sustained a flexor pollicis longus ("FPL") tear or transection.

Motions for Summary Judgment of Winthrop and Riina (004, 005)

In support of its motion for summary judgment, Winthrop submits an affidavit of Andrew Sama, MD, sworn to on August 20, 2007. Dr. Sama, a physician board certified in emergency medicine, attests, within a reasonable degree of medical certainty, that Winthrop did not deviate from accepted standards of medical care. Winthrop accepted the transfer of plaintiff from New Brunswick where he was seen by a triage nurse, physician's assistant and subsequently by Riina, a plastic surgeon with expertise in hand surgery. Winthrop also purportedly provided a Spanish interpreter. Dr. Sama states that "proper and timely care and management [were] provided to plaintiff by Winthrop" and that Winthrop's care did not cause an untimely delay in the surgery performed at NUMC and was not the proximate cause of the injuries claimed by plaintiff. Dr. Sama opined further that performing a surgical repair for a FPL laceration can be performed within five days to two weeks of the injury. Winthrop contends that even if plaintiff misunderstood

Winthrop's and Riina's instructions to appear for an appointment on July 6, 2004 and appeared on July 13, 2004 instead, there was still opportunity to achieve optimal results according to the time frame set forth by Dr. Sama.

In opposition, plaintiff argues that defendant failed to facilitate medical treatment until July 13, 2004, and that the discharge documents from Winthrop are inaccurate in that they are not clear as whom plaintiff should see, do not state the correct diagnosis, the need for surgery or the need for surgery to be done within a certain time for optimal recovery. Plaintiff's counsel claims that Winthrop's and Riina's failure to communicate plaintiff's diagnosis and need for surgery to NUMC caused a delay in treatment resulting in a compromise to plaintiff's outcome.

In support of its motion for summary judgment, Riina submits an affidavit of Robert Thomas Grant, MD, a board certified plastic surgeon, sworn to on August 17, 2007. Dr. Grant opines, within a reasonable degree of medical certainty, that the care rendered by Riina was appropriate and in accordance with good and accepted medical practice. Dr. Grant states that immediate surgery was not an option due to swelling of plaintiff's hand and the risk of infection. Dr. Grant found that Riina appropriately obtained x-ray evaluation, cleaned and sutured the wound and advised plaintiff of additional treatment that would be required. Dr. Grant states that Riina referred plaintiff to be seen by a hand specialist on July 6, 2004, but that in any event, the timing of the tendon repair ultimately performed did not affect the outcome of the surgery. In opposition, plaintiff makes essentially the same arguments made in opposition to Winthrop's motion for summary judgment.

The Court finds that defendants Winthrop and Riina have established *prima facie* entitlement to judgment as a matter of law. Winthrop and Riina have submitted evidence demonstrating the absence of departure from good and accepted medical practice. See **Gargiulo v. Geiss**, 40 AD3d 811; **Hernandez-Vega v. Zwanger-Pesiri Radiology Group**, 39 AD3d 710; **Chance v. Felder**, 33 AD3d 645; **Williams v. Sahay**, 12 AD3d 366; **DeMitre v. Monsouri**, 302 AD2d 420.

"If the defendant makes its *prima facie* showing, then the burden shifts to the plaintiff to demonstrate the existence of a triable issue of fact by submitting an expert's affidavit attesting to a departure from accepted practice and containing an opinion that the defendant's acts or omissions were a competent producing cause of the injury." **Vera v. Soohoo**, 41 AD3d 586, 587. See **Keevan v. Rifkin**, 41 AD3d 661; **Rebozo v. Wilen**, 41 AD3d 457; **Johnson v. Queens-Long Island Medical Group, P.C.**, 23 AD3d 525. In opposition to both Winthrop and Riina's motion for summary judgment, plaintiff submits only the affirmation of counsel and fails to produce a physician's affidavit of merit to support his claim that defendants deviated from good and accepted medical practice.

Thus plaintiff has failed to meet his evidentiary burden required to defeat defendants' motions for summary judgment. *See Thomas v. Richie*, 8 AD3d 363; *Scally v. Weintraub*, 295 AD2d 334; *Spicer v. Community Family Planning Council Health Center*, 272 AD2d 317.

Motion by NUMC to serve a supplemental bill of particulars (006)

In addition, defendant NUMC makes a motion seeking an Order granting it leave to serve a supplemental bill of particulars as to affirmative defenses so as to further particularize plaintiff's alleged culpable conduct and to compel plaintiff to accept such bill of particulars. By letter, dated October 2, 2007, plaintiff's counsel rejected NUMC's original bill of particulars, erroneously dated September 13, 2005, and received by NUMC's counsel on September 21, 2007, as being untimely and unresponsive. Plaintiff filed the note of issue on July 5, 2007 and NUMC now seeks leave to serve to serve a supplemental bill of particulars. NUMC argues that its delay in serving the original of particulars was neither willful nor contumacious and that particularization of plaintiff's alleged culpable conduct will not result in any prejudice to plaintiff. NUMC claims that plaintiff has known of NUMC and other defendants' claim of culpable conduct through medical records and testimony elicited during depositions. Plaintiff argues that NUMC failed to serve plaintiff with a bill of particulars for one year and nine months, which was rejected by plaintiff, and now attempts to file a supplemental bill of particulars approximately one month thereafter.

The Court finds that NUMC's motion to serve a supplemental bill of particulars is best resolved at a conference.

The court has considered the other contentions of the parties and finds them to be without merit.

Based on the foregoing, it is,

ORDERED, that defendant WINTHROP UNIVERSITY HOSPITAL's motion for summary judgment pursuant to CPLR §3212 is **granted**; and it is further

ORDERED, that defendant LOUIS H. RIINA, MD's motion for summary judgment pursuant to CPLR §3212 is **granted**; and it is further

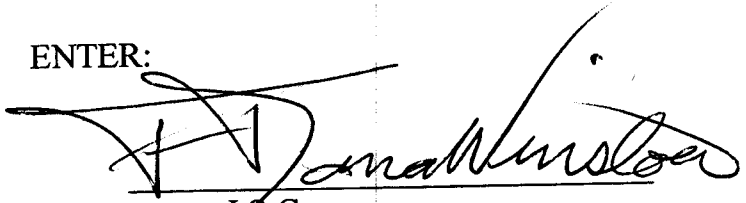
ORDERED, that defendants NASSAU HEALTH CARE CORPORATION and NASSAU UNIVERSITY MEDICAL CENTER and plaintiff are ordered to appear for the conference scheduled for February 28, 2008 in connection with said defendants' motion

to serve a supplemental bill of particulars so as to particularize its affirmative defense of plaintiff's alleged culpable conduct. The motion (Seq. #006) is adjourned to said date.

Defendant WINTHROP UNIVERSITY HOSPITAL shall serve all parties with copies of this Order within 10 days from the date of entry.

This constitutes the Order of the Court.

Dated: 2/8, 2008

ENTER:

J.S.C.

ENTERED

FEB 26 2008

**NASSAU COUNTY
COUNTY CLERK'S OFFICE**